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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GARY GOODMAN et al.,

Plaintiffs, Cross-defendants, and
Appellants,

v.

DION NEUTRA et al.,

Defendants, Cross-complainants, and
Respondents.

G046528

(Super. Ct. No. 30-2010-00397358)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kirk H. Nakamura, Judge. Dismissed and remanded.

Michael K. Hagemann for Plaintiffs and Appellants.

Emilio Law Group; Daniel G. Emilio, Justin G. Schmidt, and Kyle J.

Waldie for Defendants and Respondents.

Gary and Rhonda Goodman (the Goodmans) are keenly interested in mid-century modern architecture and hired Dion Neutra (Neutra) to design a custom home for them. Richard Neutra (Neutra's deceased father) is their favorite architect. The Goodmans bought a vacant lot in San Clemente and contacted Neutra, who was continuing his father's architectural practice. All did not proceed as planned, and the parties ended up filing lawsuits against each other.

The jury awarded the Goodmans \$100,000 on their professional negligence claim but found in favor of Neutra on the other causes of action. The jury also awarded Neutra \$30,000 on his cross-complaint for breach of contract. The trial judge declared Neutra the prevailing party on the contract and awarded him attorney fees. The final judgment awarded the Goodmans \$100,000 plus their costs, but this amount was offset by the \$30,000 awarded Neutra plus his attorney fees and costs. The net result was a judgment ordering Neutra to pay the Goodmans \$27,626.92, which he paid in full.

The Goodmans, having accepted the benefits of the judgment, seek to appeal the unfavorable portions of the jury's verdict and court rulings. As a general rule, a party loses the right to appeal by acceptance of the fruits of the judgment. In this case, we conclude none of the equitable exceptions to the general rule apply, and the appeal must be dismissed. Because Neutra is entitled to attorney fees and costs on appeal as the prevailing party, we remand the matter for the trial court to determine the amount of such fees and costs.

I

In January 2009, the parties entered into a written contract for architectural services. The agreement stated Neutra would charge \$125 per hour. The parties orally agreed the project's budget would be between \$750,000 to \$1 million dollars. Neutra told the Goodmans his design fees could be anywhere between 15 to 30 percent of the budget.

In July 2009, Neutra provided the Goodmans with a rough rendering of the proposed house. By this time the Goodmans had paid Neutra a retainer (\$7,500) and several bills totaling over \$34,000. In August 2009, Neutra sent another bill for \$33,626 and the Goodmans notified Neutra, for the first time, that they only had \$100,000 to spend on architectural services. They requested he put all the work on hold or complete the plans for \$100,000. The parties dispute whether Neutra affirmatively agreed to complete and sign the plans for \$100,000.

In October 2009, the Goodmans refused to pay Neutra any more money, and they demanded he stop working on the project. In December, the Goodmans told Neutra to finish the design phase for the \$100,000 already paid, which included signing and stamping the plans. The Goodmans also asked Neutra to terminate the contract and provide them with the unsigned and non-stamped plans. Neutra refused their demands and continued to send bills to the Goodmans.

The Goodmans sued Neutra and his company Dion Neutra, Inc. (which we will collectively and in the singular refer to as Neutra) and alleged, inter alia, breach of contract, professional negligence, and intentional misrepresentation. Neutra filed a cross-complaint alleging breach of contract, a common count for open book account, a common count for account stated, and quantum meruit. He alleged the Goodmans still owed him \$86,174, under the terms of the written agreement hiring Neutra to provide architectural consulting work.

The case went to trial in September 2011, and it was the Goodmans' theory they were entitled to the same amount of damages (\$306,000) under any theory of recovery alleged in the complaint. They presented evidence to support their theory the written contract was orally modified to include a \$100,000 limit on architectural fees, and Neutra breached this modified term. The Goodmans' professional negligence claim was based on evidence Neutra violated the California Architects Practice Act (CAPA)

(Bus. & Prof. Code, § 5500 et seq.), which required certain information to be included in the written agreement (Bus. & Prof. Code, § 5536.22), and based on evidence Neutra designed a house that exceeded the Goodmans' construction budget. Finally, the basis for the intentional misrepresentation claim was Neutra lied about how much the plans and construction would cost.

The jury found in favor of Neutra on the breach of contract claim and the intentional misrepresentation action. It awarded Neutra \$30,000 on his cross complaint, finding the Goodmans breached the written contract by failing to pay him. However, the jury found in favor of the Goodmans on the professional negligence action, awarding them \$100,000. The net verdict was \$70,000 in favor of the Goodmans.

At the end of October 2011, Neutra filed a motion for attorney fees as the prevailing party on the contract and a memorandum of costs. Thereafter, the Goodmans filed their memorandum of costs and motions for: (1) judgment notwithstanding the verdict and new trial in the alternative on the cross-complaint; (2) motion for attorney fees or judgment notwithstanding the verdict or new trial on the breach of contract cause of action in the alternative; (3) prejudgment interest; and (4) to tax and strike Neutra's costs. Neutra responded by filing a motion to tax and strike the Goodmans' motion for costs.

In December 2011, the court denied the Goodmans' numerous post trial motions. The following month, the court granted Neutra's motion for attorney fees, awarding him a reduced amount of \$47,287.50. The court explained the reduction reflected fees incurred for only the time spent on the breach of contract causes of action. In January 2012, the trial court granted the Goodmans' motion to strike costs and awarded Neutra a reduced sum of \$51,066.14. In addition, the court granted Neutra's motion to strike costs and awarded the Goodmans a reduced sum of \$4,003.73.

At the end of January 2012, the court entered a final judgment stating the jury awarded the Goodmans \$100,000 on the professional negligence claim. The court

ruled the Goodmans were entitled to recover post-verdict, prejudgment interest (\$2,712.33) and costs and disbursements taxed (\$5,500.73). The judgment stated, “that said money judgment is partially satisfied by the following: ¶ [1.] The \$30,000[] awarded to [Neutra] on [the] cross-complaint. ¶ [2.] Post-verdict, prejudgment interest on the cross-complaint in the sum of \$904.39. ¶ [3.] . . . [A]ttorney[] fees in the sum of \$47,287.50. ¶ [4.] . . . [C]osts and disbursements taxed in the sum of \$3,784.64. ¶ Said partial satisfaction resulting in a net monetary judgment in favor of [the Goodmans], and against [Neutra] . . . in the amount of \$26,236.53.”

The Goodmans scheduled a judgment debtor’s exam and requested that Neutra pay the amount ordered by the judgment. After Neutra satisfied the judgment and the Goodmans accepted the money, the Goodmans filed an appeal challenging the court’s rulings and jury verdict on the two breach of contract claims (complaint and cross-complaint), the attorney fee award to Neutra as the prevailing party on the contract actions, and the intentional misrepresentation claim. Neutra did not file an appeal.

II

After receiving the Goodmans’ opening brief, Neutra filed a motion to dismiss the appeal asserting the Goodmans waived their right to appeal by voluntarily accepting the benefits of the judgment, i.e., requesting and receiving \$26,236.53 from Neutra. We ordered that the motion would be decided in conjunction with the appeal. Neutra is correct, the appeal must be dismissed.

A. Factual Summary of Payment

We first include a brief summary of the facts relating to the manner in which the Goodmans demanded payment of the judgment. After the jury rendered its verdict, but before the court entered the final judgment in January 2012, the Goodmans served Neutra with a notice of a judgment debtor’s examination. The notice stated Neutra owed the Goodmans discovery monetary sanctions (\$1,100) incurred during the

lawsuit. Neutra sent a check for this entire amount, but the Goodmans pressed forward with the scheduled judgment debtor's examination.

Neutra's counsel wrote letters and made several telephone calls, asking why the Goodmans were continuing with the judgment debtor's examination. The Goodmans' attorney gave the vague response, "there are a plethora of reasons." The Goodmans demanded a copy of Neutra's financial records for the debtors examination.

At the scheduled December 2012 judgment debtor's examination, the Goodmans filed a brief stating Neutra owed \$16.88 for interest on the discovery sanction. They also sought \$135 in costs to conduct the debtor's exam. And finally, the Goodmans stated the jury found Neutra liable for \$70,000 and "[w]hile no judgment had been entered, one should have been within 24 hours. . . . Equity regards as done what should have been done."

Neutra's counsel accused the Goodmans of harassing his client because the request for \$70,000 and financial documents was "highly improper" and "unethical conduct." Counsel noted there was currently no final judgment and the Goodmans had filed many motions seeking such relief as a new trial and to overturn the verdict. The trial court continued the judgment debtor's examination to a date after entry of the judgment. In the meantime, Neutra sent the Goodmans a check for \$152 to cover the alleged interest and fees associated with collection of the discovery sanction. Thereafter, the Goodmans refused Neutra's requests to take the judgment debtor's proceedings off calendar.

Neutra filed an ex parte application for a protective order and temporary stay of the judgment enforcement proceedings. Neutra explained the Goodmans refused to take the debtor's examination off calendar on the grounds they wanted to get a "head start" on judgment collection proceedings." Neutra sought a protective order against continuing the judgment debtor's examination on the grounds he was 85 years old and his health was declining. His counsel asserted it would be a physical hardship to require

Neutra to personally appear for unnecessary court hearings. Counsel explained the hearing was premature because no judgment had been entered and the discovery sanctions had been paid. In addition, Neutra asserted good cause existed for granting a temporary stay of enforcement of the judgment because the Goodmans may file an appeal and Neutra was considering an appeal. Neutra submitted, "If the judgment is indeed entered and neither party appeals, then [Neutra] is prepared and ready to provide payment in full for the judgment amount."

The Goodmans opposed the ex parte application, stating Neutra's request for a stay is "based on the speculation [the Goodmans] will appeal. [Neutra has] presented no theory in which they won't have to pay at least the current judgment. Therefore, granting a stay would serve no purpose."

On February 1, 2012, Neutra paid the Goodmans \$27,828.92 in satisfaction of the judgment. Pursuant to the Goodmans' request, the sum was electronically wire transferred into their counsel's (Michael K. Hagemann's) account. Hagemann confirmed receipt of the funds. On February 21, Neutra asked the Goodmans to execute and file an acknowledgement of satisfaction of judgment under Code of Civil Procedure section 724.030.

Hagemann refused, explaining Neutra "paid the currently collectable portion of the judgment," but he may owe more if the Goodmans prevail on appeal. He stated the Goodmans had filed an appeal and they intended "to file a bond for 1.5 [times] the judgments and orders we are appealing from in order to stay those amounts so we can collect on the full remaining judgment." Hagemann stated that to suspend collection of the remaining judgment (\$81,976.53), Neutra would have to post a bond for \$122,964.80. Hagemann opined that if Neutra posts a bond, "I don't think the judgment would be considered satisfied; rather, collection would be stayed." He also opined "There is no risk to . . . Neutra because we cannot collect on the bond unless we prevail on appeal."

Hagemann asked Neutra if he would save both sides money and obtain only one bond for both sums of money and the Goodmans would pay half the bond premium.

As stated in the introduction to their opening brief, the Goodmans appeal is based “primarily” on their contention “professionally negligent performance of a contract is also a breach of that contract.” This theory was not raised in the trial court. The Goodmans ask this court to “reverse the trial court and hold that the Goodmans are the prevailing party on the contract, and order that judgment on the breach of contract cause of action in the cross-complaint be entered in their favor. Neutra . . . should not have been entitled to . . . attorney’s fees, costs, or interest, when the services rendered were defective. In addition, [this court] should remand the action to allow the trial court to determine the reasonable attorney’s fees, expert witness fees, and interest due the Goodmans.” In their summary of the argument on appeal, the Goodmans further explain they “primarily seek to reverse the trial court’s determination that Neutra . . . [was] the prevailing part[y] on the contract claims. All other relief sought on appeal, except for minor issues that are conditionally argued or argued in the alternative, logically follow from the prevailing-party-on-the-contract determination.”

Specifically, the Goodmans raise the following 10 arguments in their briefing on appeal: (1) Neutra breached the contract as a matter of law because his negligent performance of the contract (CAPA violations) was also a breach of implied terms in the contract; (2) alternatively, the Goodmans are entitled to judgment notwithstanding the verdict or a new trial on the breach of contract action because there is substantial evidence supporting each element of a breach of contract action; (3) the court improperly denied their motion for new trial on the ground there was no notice or memorandum filed; (4) the court improperly refused several jury instructions warranting a new trial; (5) there is insufficient evidence to support any element of Neutra’s breach of contract action raised in the cross-complaint; (6) alternatively, the court should have granted a new trial on the cross-complaint and in the second trial give previously rejected

special jury instructions; (7) the Goodmans are entitled to attorney fees because they prevailed on the contract; (8) Neutra is not entitled to attorney fees and costs because he did not prevail on the contract; (9) the Goodmans are entitled to prejudgment interest (either 10 percent or seven percent from the date of each payment to Neutra, or seven percent from the date of filing); and finally (10) the Goodmans conditionally requested a new trial on the intentional misrepresentation cause of action in the event a new trial is ordered on any of the issues above.

B. Waiver – Consequence of Acceptance of Benefits

“It is the settled rule that the voluntary acceptance of the benefit of a judgment or order is a bar to the prosecution of an appeal therefrom. [Citations.]’ [Citation.] The rule is based on the principle that ‘the right to accept the fruits of the judgment and the right to appeal therefrom are wholly inconsistent, and an election to take one is a renunciation of the other. [Citation.]’ [Citation.]” (*Epstein v. DeDomenico* (1990) 224 Cal.App.3d 1243, 1246 (*Epstein*)). In other words, “acceptance by the appellant of the benefits of a judgment constitutes an ‘. . . affirmation of the validity of the judgment against him.’ [Citation.]” (*Lee v. Brown* (1976) 18 Cal.3d 110, 114 (*Lee*)).

“Although the acceptance must be clear, unmistakable, and unconditional [citation], acceptance of even a part of the benefit of a judgment or order will ordinarily preclude an appeal from the portion remaining. [Citation.]” (*Epstein, supra*, 224 Cal.App.3d at p. 1246.) “As is so often the case, however, application of the rule has generated a number of equitable exceptions.” (*Lee, supra*, 18 Cal.3d at p. 115.)

First, “a waiver will be implied [only] where there is *voluntary compliance* with a judgment” (*Lee, supra*, 18 Cal.3d at p. 115.) “Thus where compliance arises under compulsion of risk or forfeiture, a waiver will not be implied. [Citations.]” (*Id.* at p. 116.) The parties agree this exception does not apply.

Under the second exception (and the parties dispute its applicability), “one may appeal from a portion of a severable and independent judgment while accepting the benefits of the unaffected remainder of the judgment. [Citations.]” (*Lee, supra*, 18 Cal.3d at p. 115.) “The test of whether a portion of a judgment appealed from is so interwoven with its other provisions as to preclude an independent examination of the part challenged by the appellant is whether the matters or issues embraced therein are the same as, or interdependent upon, the matters or issues which have not been attacked. [Citations.] “[I]n order to be severable, and therefore [separately] appealable, any determination of the issues so settled by the judgment . . . must not affect the determination of the remaining issues whether such judgment on appeal is reversed or affirmed. . . . Perhaps another way of saying it would be that the judgment is severable when the original determination of those issues by the trial court and reflected in the judgment or any determination which could be made as a result of an appeal cannot affect the determination of the remaining issues of the suit. . . .” [Citation.]’ [Citation.]” (*Gonzales v. R.J. Novick Constr. Co.* (1978) 20 Cal.3d 798, 805-806 (*Gonzales*).)

In this case, the Goodmans contend their appeal falls within the second equitable exception because the appealed portions of the judgment are severable. They point out the appeal does not concern the jury’s \$100,000 judgment relating to their professional negligence action, and in this appeal, they are simply seeking to recover additional damages on unrelated causes of action. They explain the receipt of \$27,828.92, “some of which was related to a sanctions order, is not a waiver of the right to appeal because [the Goodmans] right to this money is not disputed in this appeal.

Further, [they] never received any money from [Neutra’s company Dion Neutra, Inc.]”¹ In addition, the Goodmans maintain they “are primarily appealing the award of attorney fees and costs, issues which are clearly severable. [They] are also appealing the denial of two motions for judgment notwithstanding the verdict which are also severable. There are simply no issues relevant to this appeal that would necessitate reversal of the professional negligence cause of action.”

If the Goodmans were proceeding on the same theories raised in the trial court we would agree the claims were severable. After all, as plainly stated in the Goodmans’ closing arguments at trial, the breach of contract claim was based on two alleged breaches relating to *conduct distinct from* the four CAPA violations and misconduct allegations giving rise to the professional negligence action. Review of one claim would in no way effect the other.

However, the Goodmans’ argument on appeal (and in their motions for a judgment notwithstanding the verdict) raise a new theory of recovery, rendering the breach of contract interdependent on the professional negligence claim. Indeed, the Goodman’s explain liability for breach of contract should be *premised* on the professional negligence verdict. The Goodmans recognize this new theory of liability will not entitle them to more damages, but rather will make them eligible for prevailing party status and attorney fees (and striking the attorney fees already awarded to Neutra on his cross-complaint).

Specifically, the Goodmans maintain this court must conclude, as a matter of law, Neutra’s professional negligence (based on violations of the CAPA) must also be

¹ Little needs to be said about this last contention, that the issues on appeal are severable because the Goodmans received a payment from Neutra but not from his company, Dion Neutra, Inc. The Goodmans did not allege a separate theory of recovery against the company. The underlying facts and theories of liability were the same for both defendants. Indeed, the trial court entered a joint and severable judgment obligating both Neutra and his company to pay a total of \$27,828.92. That sum was paid in full, and the Goodmans are not entitled to any more from Dion Neutra, Inc.

deemed an ordinary breach of the written contract. They point to the evidence establishing the professional negligence verdict was soundly based on Neutra's failure to include information in the written contract (such as his license number and a description of services) and his failure to communicate a design budget or draft plans for a house that could be built within the construction budget. They do not allege the plans were defectively drafted or unusable for any other reason.

The Goodmans' legal argument on appeal is Neutra's duty to act as a reasonable professional should be an implied term of the contract, and breach of an implied term is the same as the breach of an express term. They conclude the professional negligence verdict should also prove Neutra breached the implied term of the contract and he cannot be deemed the prevailing party.²

Not surprisingly, in the respondent's brief, Neutra directly challenges the validity of the professional negligence jury verdict. Although ordinarily a respondent cannot challenge a final judgment unless they personally notice an appeal, "[r]espondents can, however, request review of any matter for the limited purpose of determining whether the appellant was prejudiced by errors asserted as grounds for reversal or modification of the judgment from which appellant's appeal was taken. [(See, Code Civ. Proc., § 906; *Platypus Wear, Inc. v. Goldberg* (2008) 166 CA4th 772, 781.)]" (Eisenberg

² We note a lot would have to happen for the Goodmans to be deemed the prevailing party in this case. If we assume for the sake of argument the Goodmans could successfully vacate the jury verdict on the contract claim and also prove the contract was breached by Neutra's negligence, there was no guarantee they would be deemed the prevailing party on the contract. The Goodmans also must overcome the jury's determination they breached the written contract by failing to pay Neutra for a portion of his services. On remand, the trial court could reasonably determine Neutra remained the prevailing party on the contract. We are amazed the Goodmans took the risk of incurring attorney fees and costs on appeal for the very slim chance this court would overturn the jury's entire verdict and enter a judgment notwithstanding the verdict as opposed to the more favored remedy of remanding the matter for a new trial, including the professional negligence claim.

et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2012) ¶ 2:305, p. 2-158.) Given the nature of the Goodmans' argument on appeal that one claim is premised on the other, we must consider Neutra's contention the professional negligence verdict should be overturned (rendering the Goodmans' premise faulty and the appeal meritless).

With respect to the professional negligence verdict, Neutra argues the jury was improperly instructed the CAPA violations created a presumption of negligence. Neutra also provides case authority to support his theory not all findings of negligence qualify as a breach of contract. And he argues the primary case the Goodmans rely upon for their new theory on appeal, *Tolstoy Constr. Company v. Minter* (1978) 78 Cal.App.3d 665, 673, is inapt. Neutra argues that case concerned a building contractor who could not recover payment based on the terms of a contract due to the doctrine of substantial performance. Neutra explains the court determined the contractor's inferior construction of a house led to significant property damage and for this reason he was not entitled to payment. Neutra notes the Goodmans do not allege the plans were defectively drafted and they fail to cite any case authority suggesting a per se rule, i.e., any negligence qualifies as a breach of contract.

Accordingly, to properly evaluate whether Neutra breached the contract based on his alleged negligent performance of duties, this court would have to evaluate the basis for the professional negligence verdict and whether it was appropriate. If we agreed with Neutra's arguments about the improper jury instructions and find his case authority applicable, our decision could result in a reversal of the professional negligence verdict. Moreover, if Neutra is right, we could remand the entire action for a retrial with proper jury instructions and permit the jury to determine if Neutra's purported negligence also amounted to a breach of the written contract.

In light of the above, we conclude the appeal must be dismissed. The Goodmans demanded payment of the judgment, representing the \$100,000 verdict in

their favor for professional negligence and costs, offset by Neutra's favorable verdict on the cross-complaint, attorney fees. and costs. Voluntary acceptance of the benefit of the judgment precludes an appeal of the unfavorable portions of the judgment, especially when the issues are so interwoven and interdependent upon those not attacked on appeal.

III

The appeal is dismissed and the motion to augment the record is denied. Respondents request reasonable attorney fees and costs on appeal. Respondents are entitled to its attorney fees and costs as the parties prevailing on the appeal. (Cal. Rules of Court, rules 8.493 & 8.278.) We remand for the limited purpose of permitting the trial court to exercise its discretion on the amount to award Respondents for their attorney fees and costs for the appeal.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.